In the Supreme Court

OF THE

United States

OCTOBER TERM, 1926

No. 306

CORNELIUS ANDERSON, suing on behalf of himself and all other seamen employed in Interstate and Foreign Commerce by sea on vessels flying the flag of and engaged in the Merchant Service of the United States of America and sailing to and from ports on the Pacific Coast of the said United States,

Petitioner,

vs.

SHIPOWNERS ASSOCIATION OF THE PACIFIC COAST, PACIFIC AMERICAN STEAMSHIP ASSOCIATION, their members, associates, agents and servants, JOHN DOE and RICHARD ROE,

Respondents.

BRIEF FOR RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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Subject Index

Table of Authorities Cited

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STATEMENT OF THE CASE.

This suit is brought by Cornelius Anderson, a sailor, to enjoin two associations of shipowners from enforcing certain rules and regulations followed by them in the employment of seamen.

Anderson is a sailor working upon vessels sailing in interstate commerce from Pacific Coast ports. He is suing on behalf of himself and all other seamen similarly employed.

The Shipowners Association of the Pacific Coast is a membership corporation. The Pacific American Steamship Association is an unincorporated association. The members of these organizations own or control nearly all vessels sailing from ports on the Pacific Coast.

The bill of complaint alleges that the defendant associations have combined to restrain the freedom of all seamen sailing from Pacific Coast ports in interstate commerce. To that end, it is alleged, they maintain employment offices at which almost all of the seamen in the commerce aforesaid are employed. As a condition of being employed the complaint alleges that,

> "the defendants compel all seamen seeking employment to register and take a number and take his turn for such employment according to such number".

This is the substance of the complaint. Reference is made in the complaint to a certificate, continuous

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NOTE: For convenience the words "plaintiff" and "defendants" are used throughout instead of "petitioner" and "respondents".

discharge book, and assignment card, but these are unimportant, being merely the instrumentalities used to carry into effect the regulations set forth.

It is alleged that the plaintiff Anderson sought employment at defendants' employment office but was refused registration or employment; that later he was engaged for work by the mate of the ship "Caddopeak" but was prevented from working by the orders of the company that no man should be employed except through the employment office of the defendants.

Plaintiff sued for damages and to enjoin the defendants from doing or performing any of the acts against which complaint is made.

Defendants interposed motions to dismiss, testing the sufficiency of the complaint.

The District Court ordered the bill dismissed.

The Circuit Court of Appeals for the Ninth Circuit affirmed this decision.

The matter is now before this Court upon writ of certiorari.

QUESTIONS INVOLVED.

The complaint alleges that the acts of defendants violate subdivision 3 of Section 8 of Article I of the Constitution of the United States. They are also alleged to violate the Act of Congress of June 7, 1872, commonly known as the Shipping Commissioner's Act. The acts of defendants are further alleged to restrain the freedom of plaintiff and all other seamen engaging in interstate commerce.

The case, then, divides itself into four questions:

(1) Do the acts of the defendants violate subdivision 3, Section 8, Article I, Constitution of the United States?

(2) Do the acts of the defendants violate the Shipping Commissioner's Act?

(3) Do the acts of the defendants violate the Sherman or Clayton Anti-Trust Acts?

(4) Do the acts of the defendants constitute an unlawful restraint of trade or competition?

These will be taken up in the order mentioned.

ARGUMENT.

DO THE ACTS OF THE DEFENDANTS VIOLATE SUBDIVISION 3, SECTION 8, ARTICLE I, CONSTITUTION OF THE UNITED STATES?

Subdivision 3, Section 8, Article I of the Constitution of the United States, is commonly known as the "commerce clause" of the Constitution. It provides that Congress shall have power "to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes".

Theory of the Complaint.

The theory of the complaint is that the acts of defendants constitute "regulations" of commerce which Congress alone is empowered under the Constitution to make or enforce. (Assignment of Errors No. 7, Trans. p. 24.) (Bill of Complaint par. X.)

The Regulations Do Not Violate the Commerce Clause of the Constitution.

Article I, Section 8, subdivision 3, of the Constitution gives to Congress the right to regulate interstate commerce. The grant of this power is complete and exclusive. It carries with it the prohibition of the exercise of the same power by any of the states.

Gibbons v. Ogden, 9 Wheat. 226.

But it was never intended, and has never been held, to prohibit the private regulation by interstate carriers of their own business.

A regulation by a group of shipowners of the manner in which they will hire seamen is not an exercise of the power granted to Congress by the Constitution.

Decision of the Supreme Court of the United States.

The identical question was briefly decided contrary to the contention of plaintiff by this Court in the case of *Alfred Street v. Shipowners Association, et al.,* reported at 263 U. S. 334. There, suit was brought by Street, a seaman, against the present defendants to enjoin the regulations complained of in the present suit. The District Court dismissed the bill. An appeal was taken direct to the Supreme Court of the United States. Mr. Justice McKenna, expressing the unanimous opinion of the Court, declared the Court to be without jurisdiction. He said:

> "According to section 238 of the Judicial Code, appeal or error may be prosecuted from the district courts when their jurisdiction is in issue; in prize cases; *in any case that involves the construction or application of the Constitution of the United States;* in any case in which the constitutionality of any law of the United States

> or the validity or construction of any treaty is drawn in question; in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.
>
> "It is manifest that the present case falls within none of the enumerated cases, *whether the regulations of the Associations be regarded as an exercise of the power, which it is contended Congress alone possesses*, or which has conferred upon the shipping commission, or be regarded as violations of the anti-trust law." (Italics are ours.)

The case was ordered transferred to the Circuit Court of Appeals.

The decision of this Court is conclusive. If the case had involved a violation of the "Commerce Clause" of the Constitution this Court would have had jurisdiction under Section 238 of the Judicial Code. This Court declared that it was without jurisdiction. The Constitution of the United States is not here involved.

DO THE ACTS OF THE DEFENDANTS VIOLATE THE SHIPPING COMMISSIONER'S ACT?

The next contention of plaintiff is that the acts and regulations of defendants violate the Shipping Commissioner's Act.

The Shipping Commissioner's Act, in general, regulates the contract of shipment under which seamen are engaged. More specifically, it declares that the shipping commissioner shall superintend the engagement and discharge of seamen in the manner provided by law, and provides that the actual execution

of the articles of shipment and discharge shall be in the presence of the commissioner.

The Act further requires the commissioner to afford facilities for engaging seamen by keeping a register of their names and characters.

The Theory of the Complaint is That the Private Hiring of Seamen is Illegal.

At the outset it is to be observed that the combination of the defendants here is immaterial. Under the Shipping Commissioner's Act, if the *private hiring* of a seaman is unlawful, it is unlawful whether by a single shipowner or by a combination of shipowners. The illegality, if at all, is in the private hiring. The combination is immaterial.

It is also to be noted that the rules and regulations of the defendants operate uniformly upon all seamen, and that there is no showing of any discrimination in favor of or against any one.

The sole question therefore is the legality under the Shipping Commissioner's Act of the private hiring of seamen.

The Shipping Commissioner's Act.

The Shipping Commissioner's Act is long, consisting of more than one hundred sections. We therefore confine ourselves to a general survey of the Act and to a particular consideration of those sections specifically referred to and relied upon by plaintiff.

The first division of the Act provides for the *creation of the office of shipping commissioner,* and prescribes the *duties and powers* of the commissioners.

These are, generally, to superintend the engagement and discharge of seamen, and to afford facilities for engaging seamen by keeping a register of their names and characters (R. S. 4508) (9 Fed. St. Ann., 2nd Ed. p. 134).

Shipment is the subject of the next division. It prescribes the form of shipping articles (R. S. 4511) (9 Fed. St. Ann., 2nd Ed. p. 139); requires that they be executed by the seamen in the presence of the commissioner (R. S. 4512) (9 Fed. St. Ann., 2nd Ed. p. 142); and provides penalties for violations (R. S. 4514-15) (9 Fed. St. Ann., 2nd Ed. pp. 143-4).

Wages and effects of seamen are next provided for in the Act (R. S. 4524-48) (9 Fed. St. Ann., 2nd Ed. pp. 151-181).

Then follow regulations governing *discharge*. The Act requires that the discharge shall be in the presence of the commissioner; that the master shall render an accounting prior to discharge, and that the parties upon discharge shall execute mutual releases (R. S. 4549-53) (9 Fed. St. Ann., 2nd Ed. pp. 181-4).

Provision is then made for the *protection and relief of seamen*, the Act dealing in general with the seaworthiness of vessels, their provisions, medicine, fuel, the clothing provided, and the watches and duties of the seamen (R. S. 4554-91) (9 Fed. St. Ann., 2nd. Ed. pp. 184-214).

Offenses and their punishment are finally set forth (R. S. 4596-4611) (9 Fed. St. Ann., 2nd Ed. pp. 215-229).

This in brief is the Shipping Commissioner's Act.

Purpose and Scope of the Act.

A reading of the Act in its entirety reveals its purpose and scope. The purpose of the Act is plain. It is to define the rights and duties of seamen. The Act sets forth these rights and duties, and contains provisions insuring their enforcement. The scope of the Act is equally plain. *It extends from the execution of the articles of shipment to the execution of the discharge, and governs all of the matters intervening.* It provides that when a seaman is engaged, his contract shall be according to a certain form and shall be executed in a certain manner. It further regulates the conditions under which he shall work. Finally, it provides that the seaman shall be discharged in a certain manner.

The Act, however, extends no further than this. The limits of operation of the Act are the execution of the articles of shipment at the commencement of the employment and the execution of the discharge at its termination. The Act governs only the matters intervening.

The Act Does Not Regulate Negotiations Leading up to Employment.

Nothing in the Shipping Commissioner's Act regulates the negotiations leading up to the execution of the articles of shipment. The parties are left free to choose with whom they deal, in what manner, at what time, and upon what conditions.

The Provision Requiring the Shipping Commissioner to Afford Facilities For Employing Seamen is Not Exclusive.

The Act, it is true, requires the shipping commissioner to afford facilities for engaging seamen, but neither expressly nor impliedly does it make such a mode of employment *exclusive or compulsory.* Nowhere in the Shipping Commissioner's Act can be found a *prohibition* of the private solicitation or employment of seamen. A reading of the Act indicates clearly that such was not its purpose.

Particular Sections Relied Upon by Plaintiff.

The following sections of the Shipping Commissioner's Act are relied upon by plaintiff:

> Sec. 4507 — The Secretary of the Treasury shall assign in public buildings or otherwise procure suitable offices and rooms *for the shipment and discharge of seamen*, to be known as shipping commissioners' offices, and shall procure furniture, stationery, printing and other requisites for the transaction of the business of such offices. (Italics are ours.)
>
> Sec. 4508 — The general duties of a shipping commissioner shall be:
>
> First. *To afford facilities for engaging seamen by keeping a register of their names and characters.*
>
> Second. *To superintend their engagement and discharge in manner prescribed by law.*
>
> Third. To provide means for securing the presence on board at the proper times of men who are so engaged.
>
> Fourth. To facilitate the making of apprenticeships to the sea service.
>
> Fifth. To perform such other duties relating to merchant seamen or merchant ships as are

now or may hereafter be required by law. (Italics are ours.)

The language of these sections is clear and unambiguous. Giving to them a reasonable construction, it is apparent that the private hiring of seamen does not violate either section.

Section 4507 provides for quarters for the commissioner and establishes a place where the actual execution of the articles of shipment and discharge shall occur in his presence. It also establishes quarters where facilities are afforded for engaging seamen and the register of their names kept. It *does not* prohibit the maintenance of a private employment bureau for the hiring of seamen.

The requirement of the first subdivision of Section 4508 that the Shipping Commissioner shall afford facilities for engaging seamen by keeping a register of their names and character does not constitute a *prohibition* against private hiring. By this section seamen are merely afforded facilities of which they may avail themselves if they choose. There is not the slightest intimation that the facilities provided for by the section were intended to be exclusive or compulsory or that it is unlawful to obtain employment except by use of such facilities.

The second subdivision of Section 4508 states that the Shipping Commissioner shall superintend the engagement and discharge of seamen in the manner provided by law. The "manner provided by law" is as follows: The statute provides that the articles

of shipment and the discharge shall be according to certain prescribed forms. Upon the formal execution of the articles of shipment in the presence of the commissioner, the commissioner may examine the articles to see that they comply in all respects with the requirements of the Act. He may also satisfy himself that the seamen understand the articles, and that they execute them free from fraud, undue influence or mistake.

Upon the formal execution of the discharge in the presence of the commissioner, the commissioner may ascertain whether the parties have in all respects complied with the requirements of the Act during the voyage.

Thus the statute sets forth the complete scheme by which the Shipping Commissioner is to superintend the engagement and discharge of seamen. Nothing more is necessary.

Nothing contained in the second subdivision of Section 4508 just referred to, prohibits the private hiring of seamen. On the contrary, the section *contemplates* this by providing for its *superintendence* and *regulation* by the commissioner.

Section 4504 (R. S. 4504) (9 Fed. St. Ann., 2d Ed. p. 133) as is demonstrated by its title, merely provides a "penalty for unlawfully acting as Commissioner."

Obviously the defendants do not purport to act in any official capacity. They are not performing or attempting to perform any of the duties of the Commissioner.

Moreover, Section 4504 merely prescribes a *penalty* for a violation of the Shipping Commissioner's Act and does not afford a basis for injunctive relief or for the recovery of damages. (See R. S. 4610.) (9 Fed. St. Ann., 2d Ed. p. 228.)

Paine Lumber Co. v. Neal, 244 U. S. 459.

The remaining section of the Act relied upon, to-wit, Section 4515, reads as follows:

> "If any master, mate or other officer of a vessel knowingly receives or accepts to be entered on board of any merchant vessel any seaman who has been *engaged or supplied* contrary to the provisions of this title, the vessel on board of which such seaman shall be found shall, for every such seaman, be liable to a penalty of not more than $200."

This section merely prescribes the penalty for shipping a seaman who has not signed articles before the commissioner. A reading of the Act in its entirety permits no other construction.

Decisions Establishing the Legality of a Private Employment Bureau.

Reference has already been made to a prior suit entitled *Alfred Street v. The Shipowners Association, et al.* (*Street v. Shipowners Assn.,* 299 Fed. 5). That suit was brought by a seaman against the present defendants in this action to enjoin the same practices and regulations as are here involved.

The District Court dismissed the bill (Transcript of Record United States Circuit Court of Appeals, Ninth Circuit, *Street v. Shipowners Assn.,* case No. 4173, Trans. p. 14.)

The language of the opinion of the District Court is as follows:

> "In the execution by the defendants of the scheme of employment and discharge to which the plaintiff objects, they may possibly violate some of the provisions of the Shipping Commissioners' Act (Rev. Stat. U. S., Sec. 4501, et seq.) but not necessarily. This Act neither provides nor contemplates compulsory service or employment: The Commission is without authority to require a seaman to take a job or the owner to furnish one. It is entirely optional with the parties to say whether they desire under any circumstances to engage with each other, but if they do so desire they must conform to certain requirements prescribed by law—which it is the duty of the Commission to see are not ignored or violated. That is the scope of the Act. *To be sure, the Commissioner and his associates may also furnish some assistance as a sort of employment agency in a popular sense, but their service in that respect is not exclusive. Such bureaus may be maintained by either seamen or employers independently and may render material assistance without impinging upon either the letter or the spirit of the statutes.*" (Italics are ours.)

Upon the appeal of that case the Circuit Court of Appeals affirmed the decision of the District Court (*Street v. Shipowners Assn.*, 299 Fed. 5), saying:

> "*We agree with the Court below that the services of the Shipping Commissioner under the 'Shipping Commissioners Act is not exclusive. Such bureaus may be maintained by either seamen or employers independently and may render material assistance without impinging on either the letter or the spirit of the statute'.*" (Italics are ours.)

In the present case *Anderson v. Shipowners,* 10 Fed. (2nd) 96, the Circuit Court of Appeals for the Ninth Circuit again considered the question and expressed itself as follows:

> "It is also contended that the practices complained of violate the federal statute defining the manner in which seamen are to be employed and the nature of the shipping contract. Sections 4508, 4514, 4515, 4551 and 4612, R. S., Sections 8297, 8304, 8305, 8340 and 8392, Comp. Stat. *The registration of seamen by the defendants and the arrangements made for their employment are preliminary to the execution of the form of contract required by the statute.* It does not appear from the bill that the defendants have taken seamen to sea without execution before a commissioner of the statutory contract or that defendants have otherwise violated the above statutes." (Italics are ours.)

These decisions are conclusive against the plaintiff. The acts of the defendants here complained of do not violate the Shipping Commissioner's Act.

DO THE ACTS OF THE DEFENDANTS VIOLATE THE SHERMAN OR CLAYTON ANTI-TRUST ACTS?

The complaint alleges that the defendants herein have combined to restrain the freedom of plaintiff and all other seamen engaging in interstate commerce.

The means employed by the defendants have already been briefly set forth. Defendants own or control nearly all vessels sailing from ports on the Pacific Coast. They maintain employment offices

at which almost all of the seamen in the commerce aforesaid are employed. As a condition of being employed, "the defendants compel all seamen seeking employment to register and take a number and take his turn for such employment according to such number".

Is this a restraint of interstate commerce?

The Authority of Congress Under the Commerce Clause of the Constitution is Limited to the Regulation of Commerce.

The Sherman and the Clayton Anti-Trust Acts were enacted by Congress under the powers granted to it by Sub. 3, Sec. 8, Art. I of the Constitution of the United States, which provides that Congress shall have power "to regulate Commerce with foreign Nations and among the several States and with the Indian Tribes". It is of the utmost importance, therefore, that it be borne in mind that under this section the regulatory powers of Congress are confined to *commerce.*

The Sherman and Clayton Acts.

Congress, pursuant to the powers given it by the Constitution, has enacted the Sherman and the Clayton Acts. (Act July 2, 1890, Ch. 647, 26 Stat. L. 209.) (Act Oct. 15, 1914, Ch. 323, 38 Stat. L. 730.) (9 Fed. Stat. Ann. 2nd Ed. pp. 644 and 730.)

The only part of these acts necessary to consider at this time is Section 1 of the Sherman Act which provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several states or with foreign nations is hereby declared to be illegal."

Only Direct Restraints of Interstate Commerce Violate the Anti-Trust Laws.

Restraints upon commerce which are not direct, proximate, and immediate, but which are merely indirect, incidental, secondary and remote, do not violate the anti-trust laws. If a restraint upon *something other than commerce* affects commerce indirectly or incidentally, such restraint is not a violation of the anti-trust laws unless the acts are done with the intent to restrain interstate commerce.

These propositions have been established beyond question by the decisions of the Supreme Court of the United States.

Cases Involving Indirect Restraints Upon Commerce.

The case of *United States v. E. C. Knight,* 156 U. S. 1, involved a combination with respect to the production of sugar. There the Court held that a restraint upon *manufacture* was not a restraint of *commerce,* saying:

> "the fact * * * that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree".

The Supreme Court has frequently reiterated this principle. In the case of *United Mine Workers v. Coronado Coal Co.* (259 U. S. 344), the owner of a coal mine attempted to operate it as a non-union mine. Union miners by unlawful and violent means prevented the operation of the mine and the consequent shipping into interstate commerce of five thousand tons of coal a week. But the Court held that a restraint upon *coal mining, as such,* was not a re-

straint upon interstate *commerce* and that the acts of the defendants were not shown to have been done with the *intent* to restrain such commerce. Therefore these acts did not violate the anti-trust laws.

In the recent case of *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457, the defendants were strikers who by unlawful means interfered with the operation of the plaintiff's factory. Plaintiff received its materials and sold its products in interstate commerce. Here, too, the Court held that there was no violation of the Act for the reason that *manufacture* was not *commerce* and that the interference with manufacture by the defendants was not shown to have been with the *intent* to restrain interstate commerce.

Still more recently in the case of *Industrial Association of San Francisco, et al. v. U. S.*, 268 U. S. 64, this Court held that a combination of building material dealers in San Francisco refusing to sell locally produced materials for use on union building jobs in San Francisco, was not a restraint of interstate commerce. It was contended that the refusal to sell local materials prevented the erection of buildings which would require in their construction goods coming into the state from other states and that consequently this resulted in a restraint of interstate commerce. But the Court said that if by a resulting diminution of the commercial demand interstate trade was curtailed that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.

Principle Established by These Decisions.

In each of these cases the restraint upon production or upon consumption necessarily and inevitably affected interstate commerce at some time and in some degree at least. Yet in every case the restraint was held not to be in violation of the Sherman Act. *The reason was that the restraint upon commerce was not a direct restraint but was merely secondary and incidental.* Because the intent of the parties was directed at *something other than commerce* any restraint which their acts imposed upon interstate commerce was not one contemplated by the Act.

Further Cases Involving Indirect Restraints of Commerce.

Another class of cases to the same effect as those last cited and still more forcibly demonstrating this principle because of the fact that the activities of the defendants directly involved interstate commerce, is the class of cases including *Hopkins v. United States* (171 U. S. 578); *Anderson v. United States* (171 U. S. 604) and *Board of Trade of Chicago v. United States* (246 U. S. 231).

A case involving regulations infinitely more severe than those involved in the present suit is *National Assn. of Window Glass Mfrs. v. U. S.* (263 U. S. 403.)

A further case in point, decided not under the Sherman Act but under the Commerce Clause of the Constitution is *Adair v. U. S.* (208 U. S. 161). In that case the Supreme Court held that Congress, under its power to regulate interstate commerce, did not have the right to pass a law prohibiting any interstate car-

rier from discharging an employee because of membership in a labor organization. There the Court said,

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated. *But what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce?* Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services * * *." (Italics are ours.)

With equal force we may inquire what possible connection is there between interstate commerce and the requirement of the defendants that applicants take turns for employment according to numbers?

If the discharge of employees of interstate carriers because of affiliations with labor organizations was not sufficiently connected with commerce to authorize Congress, under the Commerce Clause of the Constitution, to legislate respecting the same, certainly the requirement that applicants for employment upon the defendants' ships shall take turns for employment according to numbers is not sufficiently connected with commerce to bring it within the scope of the Sherman Anti-Trust Act.

Application of Decisions to the Present Case.

The principle of these decisions governs this case. A combination of shipowners is alleged here. The shipowners are engaged in interstate commerce. The combination is alleged to have imposed a restraint. *The subject of this restraint is the employment of men.*

The employment of men is not commerce. Therefore a restraint upon the employment of men is not a direct restraint upon commerce. Any effect upon commerce resulting from such a combination or restraint is but secondary and indirect. As the intent of the parties is not to restrain commerce but to regulate employment, such restraint is not within the scope of the anti-trust laws.

Suppose it be contended that this combination prevents the plaintiff from engaging in interstate commerce? In the *Coronado* case (supra) the acts of the defendants prevented the plaintiff from mining and selling its coal in interstate commerce. So in the *Herkert & Meisel* case (supra) where the defendants prevented the manufacture of leather goods intended for sale interstate commerce and the consumption of materials shipped to the factory in interstate commerce. So also in the *Industrial Association* case (supra) where the refusals of local materials cut off the demand for goods shipped into the state in interstate commerce. These are merely indirect and secondary restraints upon commerce not contemplated by the Act.

Suppose it be contended that here the defendants themselves were engaged in interstate commerce? In the *Anderson* and the *Board of Trade* cases the parties there involved were engaged in interstate commerce. Buying and selling are commerce just as is transportation. But those cases are even stronger. The stock market itself in which the commission men and traders in the *Hopkins* and *Anderson* cases were engaged, and which they served to make up, was an instrumentality of commerce (*Swift & Co. v. U. S.*, 196 U. S. 375); (*Stafford v. Wallace*, 258 U. S. 495); as was the Grain Exchange in the *Board of Trade* case.

The effect of the acts of the defendants upon interstate commerce in the cases cited was merely indirect and incidental. So here the effect of the acts of these defendants upon interstate commerce is merely indirect and incidental.

Summary of Discussion.

We may summarize the discussion so far as follows:

1. ONLY DIRECT RESTRAINTS OF COMMERCE VIOLATE THE SHERMAN ANTI-TRUST ACT.

2. THE COMPLAINT ALLEGES A SHIPOWNERS' COMBINATION IMPOSING A RESTRAINT UPON THE EMPLOYMENT OF MEN.

3. THE EMPLOYMENT OF MEN IS NOT COMMERCE.

4. THERE BEING NO INTENT TO RESTRAIN COMMERCE, THE REGULATION OF THE EMPLOYMENT OF MEN IS NOT A VIOLATION OF THE ANTI-TRUST LAWS.

Or, to express the rule in another way:

A RESTRAINT UPON SOMETHING OTHER THAN COMMERCE WHICH INCIDENTLY OR INDIRECTLY AFFECTS COMMERCE IS NOT A VIOLATION OF THE SHERMAN ANTI-TRUST ACT.

Therefore the bill fails to set forth a cause of action.

Decisions of Lower Courts.

These principles have been applied to cases almost identical with the case at bar.

In *Street v. Shipowners Assn.*, before referred to, involving the same defendants imposing the same regulations as in this case the District Court expressed itself as follows:

> "Nor have I been able to apply to the facts of the case the anti-trust law. Though approaching its prohibitions the case as pleaded does not fall within their reach." (Transcript of Record U. S. Circuit Ct. of Appeals, Ninth Circuit, Case No. 4173, Trans. p. 15.)

A motion to dismiss the bill was sustained

The Circuit Court of Appeals affirmed the order dismissing the bill. (*Street v. Shipowners*, 299 Fed. 5.)

A case similar to the *Street* case and applying the same principles of law is *Tillbury, et al v. Oregon Stevedoring Co., et al.*, 7 Fed. (2d Series) 1. In that case suit was brought in the District Court for the District of Oregon by two longshoremen against a combination of persons and firms engaged in stevedoring and operating vessels sailing in interstate com-

merce. The defendants formed a waterfront employees association, established a hiring hall for longshoremen, adopted rules and regulations governing their employment and established a registration system whereby all longshoremen who applied for employment had their applications referred to a person having a list of names of men objectionable to respondents (which, it was alleged, was because of affiliations with labor organizations). If found satisfactory, they were employed; if rejected they were refused employment. The combination fixed uniform wages and no member would employ any longshoremen objected to by any other member. It was alleged that stevedoring in Portland was done almost exclusively by the defendants. Plaintiff Tillbury's application for work was denied. Plaintiff Marks was discharged. Suit was brought by them on behalf of all longshoremen similarly situated. Motions to dismiss were interposed by defendants.

The motions to dismiss the bill were sustained by the District Court (*Tillbury v. Oregon Stevedoring Co.*, Transcript of Record United States Circuit Court of Appeals, Ninth Circuit, Case No. 4542), the Court saying:

> "Not all monopolies are denounced by the anti-trust legislation of Congress. It is only such as are in restraint of interstate *traffic* or *commerce*, and it is this sort of combination that Congress has attempted to relieve * * *.
>
> "Nor are all agreements under which, as a result, the costs of conducting interstate commercial business may be increased, condemned by the anti-trust legislation. It is only where there

is some *direct* and *immediate* effect upon interstate commerce that monopolies are denounced."

* * * * * * *

"Now, to revert to the bill: By a review of the alleged manner and purposes of the organization of the Waterfront Employers Association, nothing appears to indicate that it was the intent and purpose of the promoters to stifle, hamper, or impede traffic, in any way, in interstate commerce. It would seem, on the other hand, that the organization is calculated rather to promote such traffic. *It is only where the interest of complainants as individuals touches the association that complaint is made of its maintenance and operation.*" (Italics are ours.)

The Circuit Court of Appeals affirmed the decree of the District Court dismissing the bill. (*Tillbury, et al. v. Oregon Stevedoring Co., et al.*, 7 Fed. (2d Series) 1.)

The opinion set forth the bill as in the decision of the District Court and proceeded as follows:

"We agree with the District Court in the view that the facts fail to show that commerce has in any way been impeded, or that the defendants had any purpose other than to regulate fairly the transaction of the business in which they are engaged. *The gravamen of the complaint is not that exchange or transfer or movement of goods has been impeded or interfered with, or that there has been any restriction upon the business of loading freight upon ships bound for ports in other states, but merely that certain persons have not been employed as longshoremen at Portland; and it is far from obvious that the consequences of the acts pleaded are or will be to restrain interstate commerce in the least.*" (Italics are ours.)

The Court then cited and quoted from the *Herkert* and *Meisel* case and the *Industrial Association* case already referred to, and added:

> "We conclude that it is in accord with reason, as well as the doctrine of the adjudged cases, to hold that an agreement among employers, whereby the hiring of men to work as longshoremen is governed by rules such as obtained in the association complained of, with respect to their qualifications and wages, is in no respect violative of the Acts of Congress."

In this case (*Anderson v. Shipowners Assn.*, 10 Fed. (2nd) 96) the Circuit Court of Appeals decided that the present regulations did not violate the anti-trust laws saying:

> "It is not alleged that the purpose of the practice complained of is the restraint of interstate or foreign commerce. It is contended that less capable men are employed on vessels than would be employed if the officers of the vessels looked after the employment of seamen. This result is alleged to follow from defendants' practice of employing seamen in the order in which they apply for work. *This is at most an indirect and incidental impediment to the transaction of interstate commerce.* The conduct complained of falls without the inhibition of the Sherman Act, the Clayton Act and the federal anti-trust acts generally." (Italics are ours.)

It is futile to draw distinctions between the *Oregon Stevedoring* case and the case at bar. Whatever difference there may be in the facts of the two cases the principles of law governing them are the same.

The employment of men is not commerce. A restraint upon the employment of men is not a restraint upon commerce.

THE REGULATIONS ARE NOT SHOWN TO HAVE ANY EFFECT ON COMMERCE.

An additional consideration of the utmost importance is the fact that *the regulations here involved are not shown to have any effect whatever upon trade or commerce.*

Obviously, the regulations have nothing to do with the buying and selling of commodities. Their only connection with commerce is their effect upon transportation.

Transportation has not been shown to be affected in the slightest degree. There has been no effect upon the movement of ships, the carrying of passengers, or the transportation of freight.

The only change is a difference in the personnel of the crews. Transportation remains unaltered.

The complaint in this case fails to set forth a violation of the Sherman Anti-Trust Act.

DO THE ACTS OF THE DEFENDANTS CONSTITUTE AN UNLAWFUL RESTRAINT OF TRADE OR COMPETITION?

The final question presented by the motion to dismiss the bill of complaint is whether there is shown a right to relief upon any other grounds at common law or in equity.

The Bill of Complaint Does Not State a Case Within the Jurisdiction of the Federal Court.

At the outset arises the question of the jurisdiction of the Court. No cause of action has been set forth in the bill of complaint under the Constitution, the Shipping Commissioner's Act, the Anti-Trust laws or any other Federal statute. The jurisdiction of the Federal Court to enjoin a restraint of trade under the common law, or principles of equity must therefore be considered independently.

A diversity of citizenship is alleged, it is true. An alien may sue a citizen in the Federal Courts. (Jud. Code Ch. II, Sec. 42.)

Equally as important as the diversity of citizenship however is the amount in controversy. To give the Federal Court jurisdiction the matter in controversy, exclusive of interest and costs, must exceed the sum or value of $3,000.00. (Jud. Code Ch. II, Sec. 24.)

The only statements in the bill of complaint as to the amount in controversy, or as to any amount whatever, are the allegations that the plaintiff lost employment at wages of $75.00 per month, together with his board and lodging worth $60.00 per month, and that the plaintiff's loss by reason of the premises was in the sum of $135.00 for which sum plaintiff prays judgment as damages. Other than this, the bill is silent as to the sum or value of the matter in controversy.

If the jurisdiction of the Court is to rest upon the basis of the sum claimed as damages, the value of the matter in controversy set forth in the bill is totally inadequate.

There is *nothing elsewhere* in the bill which warrants adopting any other amount or value as a basis of jurisdiction. From the facts alleged the value of the matter in controversy, calculated upon any other or different basis, would be merely a matter of surmise and conjecture.

This is of course insufficient as the sum or value of the matter in controversy, being jurisdictional, must appear affirmatively in the bill.

El Paso Water Co. v. El Paso, 152 U. S. 157;
Pinel v. Pinel, 240 U. S. 594.

Plaintiff is not entitled to combine his claim with those of the ten thousand other seamen on whose behalf the suit is brought in order to make up the jurisdictional amount.

The interests of plaintiff and the other seamen on whose behalf he purports to sue are not joint but are entirely separate and distinct. They are joined merely for convenience, and to avoid a multiplicity of suits. In such a case the value of each separate interest must appear to be equal to the jurisdictional amount. They cannot be joined in order to make up this amount.

Wheless v. St. Louis, 180 U. S. 379;
Clay v. Field, 138 U. S. 464;
Pinel v. Pinel, 240 U. S. 594;
Henderson v. Carbondale Co., 140 U. S. 253;
Waite v. Santa Cruz, 184 U. S. 302.

Moreover, this suit is not a proper class suit. There is no community of interest between the plaintiff and the persons on behalf of whom he purports to sue.

Scott v. Donald, 165 U. S. 107.

Furthermore the bill of complaint is silent as to the extent of damage to any other seamen. The joining of their claims, if this were permissible, would not make up the jurisdictional amount.

Whatever the merits of the plaintiff's contentions may be, he has failed to state a case within the jurisdiction of the Federal Courts.

The Bill of Complaint Fails to Set Forth a Combination in Restraint of Trade, Illegal Either at Common Law or in Equity.

As stated, the substance of the complaint is that the defendant shipowners maintain joint employment offices thru which they employ all seamen. As a condition of employment the defendants require all applicants to register, take a number and take turns for employment according to number.

Is this illegal?

This Case is Not One of the Recognized Classes of Restraints of Trade at Common Law.

At the outset we quote the language of the opinion of the District Court in the case of *Street v. Shipowners,* heretofore so frequently referred to:

> "So far as I am advised the suit is without precedent and I have been unable to formulate any theory upon which the complaint can be sustained."

The agreement in question is not a recognized restraint of trade at common law.

Restraints of trade which were illegal at common law were originally grouped into two classes:

1. Contracts whereby a person restrained himself from carrying on a trade or calling.

2. Monopolies.

Subsequently a third class of restraints was declared illegal.

3. Contracts to suppress or diminish competition.

(See *Standard Oil v. U. S.*, 221 U. S. 1.)

The agreement in question falls within none of these recognized classifications.

By the agreement no one disables himself from engaging in a trade or calling. No one of the shipowners has agreed not to engage in the business of shipping.

Neither is the agreement one to monopolize. The fact that all shipowners on the Pacific Coast are parties to it does not constitute the agreement a monopoly. A combination of competitors is only illegal when its purpose is to destroy competition. Here the combining parties compete against each other.

Nor is the agreement one to suppress or diminish competition. The parties to the agreement are avowedly competitors. They strive against one another in the business of shipping. The agreement in no way affects this competition of the several shipowners against each other.

The agreement is therefore not one of the recognized classes of restraints of trade at common law.

This is not to say, however, that the agreement may not be illegal merely because it does not fall within one of the enumerated Classifications.

If the Court determines that a contract is wrongful or against public policy, it may refuse to enforce it, or in proper cases, restrain its performance. This is within the inherent powers of the Court.

An examination of the principles of the decisions of this Court clearly shows, however, that the agreement in question is not contrary to the policy of the law.

Reasonable Restraints of Trade Are Not Illegal.

An agreement or regulation is not unlawful merely because it imposes a restraint upon trade or competition. In order to be illegal the regulations must impose an undue or unreasonable restraint. Reasonable restraints of trade or competition are legal.

An apt illustration of the doctrine is the case of *Board of Trade of Chicago v. U. S.*, 246 U. S. 231.

In that case all the members of the Board of Trade, by a rule of the Board, were prohibited from purchasing "grain to arrive" during the period between the close of the Call on one day and the opening of the Session on the following day at any price other than the closing bid at the call.

This rule fixed prices during a substantial part of the business day and restrained members of the Board from trading at any other price.

The lower Court enjoined the members of the Board from enforcing and carrying out the rule.

Upon appeal to the Supreme Court of the United States the decree was reversed, the Supreme Court saying:

> "But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as *merely regulates* and perhaps thereby promotes competition, or whether it is such as may *suppress* or even *destroy competition.*" (Italics are ours.)

The Court then declared that the circumstances of the case must be examined and the purpose, the nature, the scope and the effect of the rule ascertained.

It was found that the restraint in question was not detrimental but beneficial.

This decision is an application of the famous "Rule of Reason" announced in the *Standard Oil* case, in which this Court declared that not every restraint of trade was illegal but only those restraints which were undue and unreasonable.

Standard Oil v. U. S., 221 U. S. 1.

A further application of this doctrine is the decision of this Court in *National Association of Window Glass Manufacturers v. U. S.,* 263 U. S. 403.

That case involved an agreement between the manufacturers of hand blown glass and an association of glass blowers whereby a wage scale was established

and it was agreed that the men should work alternately for one set of manufacturers and then the other, during which time the factories in which the men did not work remained idle.

It was found that the price of glass was fixed by the machine made product and that the agreement between the hand workers and their employers did not affect this price.

As there were not men enough to operate both sets of hand blown glass factories, which cost as much to operate when they were undermanned as when fully manned, and because the agreement gave the men continuous employment, without which agreement they were less well off, it was held that the agreement was not an unreasonable restraint of trade.

Under these decisions, therefore, if the present agreement imposes merely a reasonable restraint it is legal.

The Present Agreement.

No formal agreement between the defendants is set forth.

The allegations of the bill of complaint are as follows:

> "That on or about the 1st day of January, 1922, the defendants herein associated and combined together to restrain the freedom of plaintiff and all other seamen * * * and to that end they established and now maintain offices in San Francisco and San Pedro in the State of California at which offices almost all seamen who are employed on vessels engaged in the trade

and commerce aforesaid are engaged and/or supplied by the defendants to the operators of such vessels so engaged in the trade and commerce aforesaid * * *. (Bill of Complaint, Par. VII.)

"That as a condition of being employed in such trade and commerce on vessels flying the American flag, the said defendants compel all seamen seeking such employment to register and take a number and take his turn for such employment according to such number, and no seaman can secure employment on the said Pacific Coast unless he takes such number and his turn for employment according to such number * * *. (Bill of Complaint, Par. VIII.)

"* * * under the system adopted by the defendants when a seaman's turn comes he must take the job the turn offers, * * * whether he wishes to engage on the particular vessel his turn calls for or not, *or lose his turn* * * *. (Bill of Complaint, Par. XVIII.) (Italics are ours.)

The foregoing allegations establish these facts:

1. That certain of the shipowners on the Pacific Coast have combined to maintain joint employment offices.

2. That these shipowners hire their men solely through these joint offices.

3. That they have established an employment office rule that applicants seeking employment will be offered employment in turn in the order of their application.

Under this system any one may apply for and obtain employment. There is no requirement that seamen must work exclusively for the defendants.

There is no discrimination for or against union men. There is no allegation that a shipowner is compelled to employ the seaman who is first on the waiting list, nor does the complaint allege that a seaman is compelled to accept employment with the first shipowner who desires to engage him.

Its Operation.

The allegations of the bill of complaint, then, merely set forth an ordinary employment office conducted according to ordinary employment office rules.

An applicant desiring employment registers with the office and awaits his turn. He reaches the head of the waiting list. An employer notifies the office that he desires to employ a man. The employment is *offered* to the applicant. He is not *compelled* to take it. He may take it if he likes it or refuse it and await the next offer. The employer, likewise, is not *compelled* to accept the applicant. He may reject him and request that another man be furnished. Jobs are not "ground out" automatically in the employment office. Employers and employees are not brought together like the meshing of gear teeth. The employment must be agreeable to both parties. It is not compulsory on either.

The Complaint.

This is not the complaint. The complaint is that a seaman cannot go directly to a mate or other officer on a ship and immediately secure employment. The shipowners require him to apply at their employ-

ment office and await his turn for employment, together with other seamen.

The bill of complaint asserts that this is illegal.

Legality of the Agreement.

The agreement may best be considered by dividing it up into its several parts.

First—The agreement between the shipowners to maintain joint employment offices is not in and of itself unlawful nor has it any sinister purpose. The intent in establishing joint employment offices is to obtain the benefits of cooperation. It eliminates duplication. It removes uncertainties and the waste and losses resulting therefrom. If jobs are to be had on any ship in the vicinity, the men can be assured of obtaining them through the central employment offices. If any men are available, the employers are likewise assured of obtaining them at the joint employment offices.

Second—The rule requiring all men to obtain employment at the joint employment offices is a most reasonable one and is necessary to insure their successful operation. If the shipowners were to hire their men at their own offices or at the ship's side, no one would apply at the joint employment offices for employment and they would soon cease to exist through disuse. But if, indeed, some men were hired at the central offices and others at other places, so that two men might be employed for the same job, hopeless confusion would result, and the benefits derived from having central employment offices would be lost.

Third—The rule requiring the seamen to take employment in the order of their application is the most logical, most fair, and obviously the most practical rule to be applied to an employment office.

"First come, first served." It is the fairest to the men and insures the satisfaction of the greatest number. Employment is no longer a matter of chance. There are no favorites.

It may be that such a rule will prevent certain seamen from immediately securing re-employment ahead of others who have been waiting for a job but opposed to this is the infinitely fairer result that one man has as good a chance as the other. It does not give one man steady employment while another waits idly by but on the contrary tends toward regular employment of all of the men. It is conducive to a greater number of applicants for work and assures a more constant supply of labor.

Subject merely to the reasonable requirement that the men be employed in the order of their application supply and demand operate freely. The terms of the employment are in no way affected by the rule. The ability and experience of the man and the desirability of the particular job, operate as before in determining whether a contract of employment will be entered into.

This is certainly not unlawful. No legal wrong is done to any one. Shipowners have a right to prescribe reasonable regulations for the employment of men and if it be that one man no longer has continuous employment while others wait, the answer is

that so long as the regulation producing this result is reasonable it is *damnum absque injuria.*

The Effect.

For all that appears in the bill of complaint, the regulations have no effect whatever upon commerce. The same number of ships sail. The same number of passengers are carried. The same quantity of freight is transported. The same number of seamen are employed. The shipping service continues as before.

As for the men, there is no allegation that the regulations have resulted in the lowering of wages or in less advantageous terms of employment.

The only effect upon them is that they all have equal chances of securing employment instead of some men working continuously at the expense of others. The result is the greatest benefit to the greatest number.

Whatever harm may result to some of the men from these regulations is no legal injury.

NO DISCRIMINATION IS SHOWN.

Plaintiff alleges that he applied at the employment office, but was refused registration or employment. This, he contends, constitutes discrimination.

There is an utter failure to connect this refusal with any rule or agreement of defendants. Plaintiff may have been refused registration because there were already too many men on hand (as is suggested by paragraph XII of the bill of complaint). For all

that appears in the bill of complaint the plaintiff may have been refused registration for some other reason entirely unconnected with the agreement and regulation sought to be enjoined.

The refusal to accept plaintiff's application at the common employment office is no more illegal than a refusal to hire him by the captain or mate of each of the ships supplied through the office.

It is not connected with any wrongful agreement or conspiracy.

CONCLUSION.

The agreement, therefore, legitimate in its purpose, fair in its operation is but a reasonable regulation of the business of the defendants and does not constitute an unlawful restraint of trade or competition.

We refer, in closing, to the language of the Circuit Court of Appeals for the Ninth Circuit in the decision of *Street v. Shipowners* (299 Fed. 5).

> "There is no complaint that the regulations are unfair or discriminatory as between seamen seeking employment, or that directly or indirectly the acts of the defendants result in any discrimination against the plaintiff or those whom he claims to represent. *The whole complaint is that the seamen desiring such employment are required to register and take a number and take their turn for employment according to such number. This regulation seems to be fair and reasonable and in the interests of a square deal.* A similar system obtains in one form or another in many public or semi-public activities. In elections provisions for registration of voters are made in many, if not all the states, for the pur-

pose of requiring persons who are electors, and who desire to vote to show that they have the necessary qualifications by requiring registration as a condition precedent to the right of such electors to exercise the privilege of voting. Bergevin v. Curtz, 127 Cal. 86, 88. We are not aware that any Court has held that any citizen has suffered a justiciable injury by reason of such a regulation, nor are we aware that taking turn at a post-office or theatre window, or in a breadline where food is being distributed to men, women, and children requiring such relief, has been held a just cause of complaint.

"Plaintiff insists, however, that the regulation is un-American. We think, on the contrary, that it is peculiarly American and well adapted for the regulation of the business of shipping seamen."

Dated, San Francisco,
October 4, 1926.

Respectfully submitted,

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